FILE COPY

Supreme Court, U.S.
FILED
OCT 4 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 72-5431

RAYMOND N. ORTWEIN and GWENDOLYN FAUBION,

Appellants,

versus

HERBERT M. SCHWAB, VIRGIL LANGTRY, ROBERT H. FOLEY, WILLIAM S. FORT, and ROBERT Y. THORNTON, individually and in their capacities as Judges of the Court of Appeals of the State of Oregon; LOREN D. HICKS, individually and in his capacity as State Court Administrator,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

~~MOTION FOR LEAVE TO FILE BRIEF~~ AND BRIEF AMICUS CURIAE OF LEGAL SERVICES FOR THE ELDERLY POOR

JURIS. STATEMENT NOT PRINTED.
RESPONSE NOT PRINTED

E. JUDSON JENNINGS
JONATHAN A. WEISS
Legal Services for the Elderly Poor
2095 Broadway
New York, N. Y. 10023
Tel. (212) 595-1340
Amicus Curiae on Behalf of Appellants

IN THE

Supreme Court of the United States

No. 72-5431

RAYMOND N. ORTWEIN and GWENDOLYN FAUBION,

Appellants,

versus

HERBERT M. SCHWAB, VIRGIL LANGTRY, ROBERT H. FOLEY, WILLIAM S. FORT, and ROBERT Y. THORNTON, individually and in their capacities as Judges of the Court of Appeals of the State of Oregon; LOREN D. HICKS, individually and in his capacity as State Court Administrator,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Legal Services for the Elderly Poor hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The interest of Legal Services for the Elderly Poor in this case arises from the fact that it is a project funded by the United States Office of Economic Opportunity to provide legal counsel and assistance to attorneys across the United States who are representing elderly persons who are destitute. Recent legislative studies show that over one-third of the persons over age 65 in this country are below the poverty level, and that another 10 percent are on the border line of poverty. For these people, the imposition

of court costs that cannot be paid constitutes an insurmountable barrier to litigation, with the result that many elderly people with just claims are denied an opportunity to be heard.

Legal Services for the Elderly Poor believes that this case is crucial in the determination of the attitude this court will take in the extension of the principles set forth in *Boddie* v. *Connecticut*, 401 U.S. (1971) to indigent persons seeking relief from the state courts. It is believed that the attached brief will focus for the court the extent and scope of this problem as it affects the indigent elderly citizens of this nation.

Respectfully submitted,

E. Judson Jennings
Jonathan A. Weiss
Legal Services for the
Elderly Poor
2095 Broadway
New York, N. Y. 10023
Tel. (212) 595-1340

September 29, 1972

INDEX

PAGE

Interest of the *Amicus* 1

POINT 1:

The Right of Poor Persons to Access to the Courts Has Deep Common Law Antecedents, Is Grounded in the Common Law of the United States and Is Binding Upon the State Courts 2

POINT 2:

The Denial of Poor Persons' Access to the Courts Solely Because They Cannot Pay Costs Constitutes an Unconstitutional Restraint Upon the Exercise of a Fundamental Right in Violation of the Due Process Clause of the Fourteenth Amendment 3

POINT 3:

The Denial of Poor Persons' Access to the Courts Solely Because They Cannot Pay Costs Is a Denial of Due Process Under Evolving Doctrines of Fundamental Fairness 5

POINT 4:

The Denial of the Right to Sue to Those Who Cannot Afford to Pay Court Costs Is a Denial of Equal Protection of the Laws, Under the "Compelling State Interest" Test or Under the "Ordinary" Test of Equal Protection 7

PAGE

POINT 5:

Free Access to the Court Is a Fundamental Concept of Ordered Democracy 9

CONCLUSION 11

TABLE OF CASES

Argersinger v. Hamlin, —— U.S. ——, 32 L.Ed.2d 530 (1972) 5

Bates v. Little Rock, 361 U.S. 516 (1960) 7-8
Boddie v. Connecticut, 401 U.S. 371 (1971) 6, 7
Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) 3
Burns v. Ohio, 360 U.S. 252 (1959) 8

Douglas v. City of Jeannette, 319 U.S. 157 (1943) 4

Gideon v. Wainwright, 372 U.S. 335 (1963) 5
Goldberg v. Kelly, 397 U.S. 254 (1970) 6
Griffin v. Illinois, 351 U.S. 12 (1955) 8

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 7
Hickey v. Rhine, 16 Tex. 577 (1856) 3
Hotel Martha Washington v. Swinick, 66 Misc. 2d 833 (N.Y. App. Term 1971) 8

In Re Gault, 387 U.S. 1 (1967) 5

Johnson v. Avery, 393 U.S. 483 (1969) 8

PAGE

Martin v. Superior Court, 176 Cal. 289 (1917) 3
Matter of Ella R. B. (Kurtis), 30 N.Y.2d 352 (1972) 5
Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1972) .. 3, 4, 8
McClenahan v. Thomas, 6 N.C. (Murph.) 247 (1813) 3
McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940) .. 4
Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943) 4

NAACP v. Button, 371 U.S. 415 (1963) 4

Pierce v. Society of Sisters, 268 U.S. 510 (1928) 4
Powell v. Alabama, 287 U.S. 45 (1932) 5
Prince v. Massachusetts, 321 U.S. 158 (1944) 4

Schneider v. State, 308 U.S. 147 (1939) 4
Shapiro v. Thompson, 394 U.S. 618 (1969) 7
Smith v. Bennett, 365 U.S. 708 (1961) 8
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 6

Williams v. Shaffer, 385 U.S. 1037 (1967) 8

Yick Wo v. Hopkins, 118 U.S. 356 (1875) 7

IN THE

Supreme Court of the United States

No. 72-5431

RAYMOND N. ORTWEIN and GWENDOLYN FAUBION,

Appellants,

versus

HERBERT M. SCHWAB, VIRGIL LANGTRY, ROBERT H. FOLEY, WILLIAM S. FORT, and ROBERT Y. THORNTON, individually and in their capacities as Judges of the Court of Appeals of the State of Oregon; LOREN D. HICKS, individually and in his capacity as State Court Administrator,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF *AMICUS CURIAE* OF LEGAL SERVICES FOR THE ELDERLY POOR

Interest of the *Amicus*

Legal Services for the Elderly Poor is funded by the Office of Economic Opportunity and sponsored by the Presbyterian Senior Services. This project provides assistance in research and litigation to legal services and other organizations serving the elderly.

The project appeared before this Court in *Messer* v. *Richardson,* 400 U.S. 987 (1970); and as *amicus curiae* in *Richardson* v. *Perales,* 402 U.S. 389 (1971); *Allied Chemical*

Workers v. *Pittsburgh Plate Glass Co.*, 404 U.S. 107 (1971); and *Graham* v. *Richardson*, 403 U.S. 365 (1971).

Recent statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. The elderly project has a continuing concern with questions involving the administration of courts which deny the needy elderly access because they cannot pay court costs.

POINT 1

The Right of Poor Persons to Access to the Courts Has Deep Common Law Antecedents, Is Grounded in the Common Law of the United States and Is Binding Upon the State Courts.

In 1215, King John signed Magna Carta, guaranteeing to his subjects:

> "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, *or in any way destroyed,* nor will we pass upon him . . . unless by the lawful judgment of his peers, or by the law of the land. To none will we sell, to none will we deny, or delay, right or justice." §§39, 40.

This right to access to the ordinary Anglo-Saxon courts of public justice regardless of poverty was observed in practice during the period following the signing of Magna Carta. Pollock & Maitland, *The History of English Law*, 2d Ed. (1899), pp. 39-40. The practice of waiving court

fees for poor persons was codified by the Statute of 11 Henry VII c. 12 (1495), 2 Statutes of the Realm 578.

State courts have asserted their inherent power to grant poor persons access to the courts without payment of fees, based upon these English common law precedents. *McClenahan* v. *Thomas,* 6 N.C. (Murph.) 247 (1813); *Hickey* v. *Rhine,* 16 Texas 577 (1856); *Martin* v. *Superior Court,* 176 Cal. 289 (1917) (*en banc*).

Surely Justice Black was correct when he stated that the United States of America can and should afford to open the doors of their courts to those unable to pay the fees. *Meltzer* v. *C. Buck LeCraw & Co.,* 402 U.S. 954 (1972) (Black, J., dissenting from the denial of certiorari). The fundamental tradition of the English Common Law, dating back nearly eight hundred years, cannot be now cast aside by this Court.

POINT 2

The Denial of Poor Persons' Access to the Courts Solely Because They Cannot Pay Costs Constitutes an Unconstitutional Restraint Upon the Exercise of a Fundamental Right in Violation of the Due Process Clause of the Fourteenth Amendment.

The First Amendment rights of freedom of speech and association include the right to form an association to aid individual members in achieving justice in the courts and the recovery of civil damages. In *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964), this court held that "The right to petition the courts cannot be handicapped." *Id.,* at p. 7. Further, the association of indi-

viduals for the purpose of establishing rights by litigation ". . . may be the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP* v. *Button,* 371 U.S. 415 (1963). See also *Meltzer* v. *C. Buck LeCraw & Co., supra,* Black, J., dissenting from the denial of certiorari.

First Amendment Rights are binding upon the States under the due process clause of the Fourteenth Amendment. *Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943); *Prince* v. *Massachusetts,* 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1928); *Schneider* v. *State,* 308 U.S. 147, 160 (1939).

The imposition of court costs upon those unable to pay them prevents them from exercising a right guaranteed by the Constitution. Such a practice flies directly in the face of this court's holding that "A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock* v. *Commonwealth of Pennsylvania,* 319 U.S. 105, 113 (1943). To the same effect, see *McGoldrick* v. *Berwind-White Co.,* 309 U.S. 33 (1940).

Accordingly, the imposition of court costs and the denial of access to the courts for failure to pay them is a violation of due process.

POINT 3

The Denial of Poor Persons' Access to the Courts Solely Because They Cannot Pay Costs Is a Denial of Due Process Under Evolving Doctrines of Fundamental Fairness.

Due process is a fluid and expanding concept, changing with the development of society. This court has constantly expanded in the last thirty years the class of cases in which the government has an affirmative duty to provide a person with some aid in litigation which is necessary to a minimally fair determination but which that person could not afford to provide for himself. *Powell* v. *Alabama,* 287 U.S. 45 (1932) required the appointment of counsel in a capital case for young, inexperienced and frightened defendants. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) extended this right to felony defendants. *In Re Gault,* 387 U.S. 1 (1967), extended it to defendants in juvenile proceedings where long term incarceration could result. *Argersinger* v. *Hamlin,* —— U.S. ——, 32 L.Ed.2d 530 (1972) extended it to misdemeanor defendants. And the New York Court of Appeals has extended the right to parents who may lose custody of their children in a neglect proceeding. *Matter of Ella R. B. (Kurtis),* 30 N.Y.2d 352 (1972). In *Gault, supra,* this court expressed an unwillingness to be bound by labels of "civil" or "criminal" in evaluating the fundamental fairness of the proceeding, looking instead to the practical result.

This court has recognized that welfare recipients, because of their extreme economic distress, must not be subject to summary action in determinations of benefits. In

cases involving complete termination of assistance, due process requires a hearing prior to withdrawal of aid. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Wage earners, at the bottom of the economic ladder of those employed, are entitled to a hearing prior to court sanctioned attachment of their earnings. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

Last term, this court, in holding that due process of law requires that indigent persons seeking divorces must not be deprived of the right to sue solely because they cannot pay the filing fee, stated:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Boddie v. *Connecticut*, 401 U.S. 371, 377 (1971).

Further,

> "Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Id.* at p. 380.

In the case at bar, appellants allege that they have been wronged by the department of welfare of their state. They are in desperate economic straits. There is no other way in which they can exert leverage to force the department

to settle the dispute. If they are to be vindicated at all, they must resort to the courts. To deny them that right is to deny them all relief. Clearly this case is within the mandate of *Boddie* v. *Connecticut, supra.*

POINT 4

The Denial of the Right to Sue to Those Who Cannot Afford to Pay Court Costs Is a Denial of Equal Protection of the Laws, Under the "Compelling State Interest" Test or Under the "Ordinary" Test of Equal Protection.

Discrimination against a disadvantaged minority is unconstitutional. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1875). This court has consistently struck down legislation which discriminates against poor persons to deprive them of a fundamental right:

> "We do not stop to canvass the relationship between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

Harper v. *Virginia Board of Elections,* 383 U.S. 663, 665 (1966). The mandatory court costs in this case encroach upon the constitutional rights of freedom of speech, freedom to petition the government for redress of grievances, and the right to be heard, all guaranteed by the Fourteenth Amendment. Thus the statutory provision must be subjected to special scrutiny, and can be justified only upon the showing of a compelling state interest. *Shapiro* v. *Thompson,* 394 U.S. 618 (1968); *Bates* v. *Little Rock,* 361

U.S. 516 (1960). A criminal defendant who is prevented from obtaining an adequate appellate record because he cannot pay court costs is denied Equal Protection of the laws. *Griffin* v. *Illinois,* 351 U.S. 12 (1955). So is a state prisoner who is precluded by inability to pay filing fees from taking a state appeal. *Burns* v. *Ohio,* 360 U.S. 252 (1959); or from bringing a habeas corpus proceeding. *Smith* v. *Bennett,* 365 U.S. 708 (1961). See *Johnson* v. *Avery,* 393 U.S. 483 (1969).

Individual Justices of this Court have taken the position that all such economic discrimination is unconstitutional. See in addition to cases cited above, *Williams* v. *Shaffer,* 385 U.S. 1037 (1967) (Douglas, J., dissenting from the denial of certiorari). At least one state court has extended this doctrine to the appointment of counsel and waiver of fees in defending an eviction suit. *Hotel Martha Washington* v. *Swinick,* 66 Misc. 2d 833 (App. Term, 1st Dept., N.Y. 1971).

This Court should adopt the position expounded by the late Justice Black in his dissent from the denial of certiorari in *Meltzer* v. *C. Buck LeCraw & Co., supra*:

> "... [T]he decision in *Boddie* v. *Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the states belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty or afford to hire an attorney." *Id.* at pp. 955-56.

POINT 5

Free Access to the Court Is a Fundamental Concept of Ordered Democracy.

The appellant and *amicus* have cited a number of cases to demonstrate that access to the Court historically has been deemed open to all and that the right of citizens for free access to the Courts has been recently recognized as constitutionally required by a range of decisions both criminal and civil. This case involving, as it does, the imposition of a financial burden upon judicial review, is controlled by these decisions, but *amicus* should like to urge this Court to consider the rationale that subtends these cases. A few basic principles, perhaps obvious but too important to be cliches, determine the importance and outcome of this case. Courts grew up as a peaceable method of settling disputes: it is far better to resolve an altercation in the Halls of Justice with an impartial arbiter than to leave it to superior forces displayed in combat in the streets. With taxes citizens pay for light, garbage collection, highways, airport construction and other programs—and with taxes, as Justice Oliver Wendell Holmes once remarked, we pay for civilization. The hallmark of American democratic civilization has always been a living doctrine of equal protection and justice. Equal protection and justice can only be achieved if people have access to the Courts. Only with equal access to the Courts to correct abuses can the promise of an ordered democracy bringing justice to all be fulfilled.

This Court has declared the right to counsel—and thereby given concrete meaning to the doctrine of equal protection

—by allowing he who is oppressed not only by poverty but also by the awesome resources available to his prosecutorial adversary to have his own lawyer. So, too, is it constitutionally crucial for those who have no means or strength to combat the oppression of the slum landlord, the merchants of deceit, and the lawlessness in administrative agencies to have access to the impartial tribunal of the Courts in order to receive some measure of protection and redress. Courts exist to channel disputes into the appropriate fair peaceful tribunal. Equal protection refers all to the Courts for resolution of disputes with an equal chance of success independent of their wealth, status, race, sex or prestige. Justice, therefore, demands that when there is an imposition of a fee for access to the Courts or for an appeal which by its financial burden diminishes the possibility of recourse to the Court and prevents the poor from having a chance to present their own case or redress a grievance, then that unfair, undemocratic, and unconstitutional burden must be struck down as void under the Constitution. The cases that *amicus* discussed above which dispose of the case indicate this rationale: the fundamental tenets of democracy and the jurisprudential structure of American constitutional decisions dictate the result in this case.

CONCLUSION

For all of the foregoing reasons, this Court should set this appeal for oral argument and reverse the judgment of the court below.

Respectfully submitted,

E. JUDSON JENNINGS
JONATHAN A. WEISS
Legal Services for the
Elderly Poor
2095 Broadway
New York, N. Y. 10023
Tel. (212) 595-1340
Amicus Curiae on Behalf
of Appellants